

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

09	CURTIS NEAL WELLS,)	CASE NO. C05-0988-TSZ-MAT
10	Petitioner,)	
11	v.)	REPORT AND RECOMMENDATION
12	ROB MCKENNA,)	
13	Respondent.)	

INTRODUCTION

Petitioner Curtis Wells is currently in the custody of the Washington Department of Corrections serving the community custody portion of a King County Superior Court judgment and sentence. He has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 challenging his conviction on one count of indecent liberties. (Dkt. #1). Respondent has filed an answer to the petition, along with the state court record. (Dkt. #9, #12). Petitioner has not filed a response. Having considered the petition, answer, and the balance of the record, the court recommends that the petition be dismissed without prejudice.

BACKGROUND

The Washington Court of Appeals summarized the facts in petitioner's case as follows:

In June 2001, Kimberly Miller made an appointment for a massage with Curtis Neal Wells, a licensed massage therapist, at his Kirkland office. Miller chose Wells from her preferred provider directory after a doctor prescribed massage therapy as

01 treatment for back pain.

02 Miller arrived for her appointment, and, on Wells' advice, agreed to undergo
03 a Hawaiian massage. Miller removed all her clothes except her underwear, laid face
04 down on the massage table, and covered herself with a sheet. As the massage
05 proceeded, Miller became concerned when she felt what she thought was Wells' penis
06 rub against her hand. Miller raised her head and saw that Wells' pants had become
07 unzipped. She gave Wells the benefit of the doubt, however, thinking his behavior
08 possibly unintentional. Wells proceeded to touch Miller's breasts in a manner that
made her extremely uncomfortable and repeatedly brushed off the small towel
covering Miller's chest. The massage continued with Wells removing the sheet
covering Miller's body and briefly touching her under her underwear. Wells then
climbed onto the massage table and straddled Miller, pressing his thighs against her
and rubbing her bottom. At this point, Miller realized that Wells had only his
underwear on and that he was aroused.

09 Miller was shocked, but allowed Wells to complete the massage because she
10 was afraid and believed that no one else was in the building. Miller returned home
11 and called police, who arrested Wells. A jury convicted Wells of one count of
indecent liberties.

12 *State v. Wells*, 118 Wash. App. 1061 (Unpublished Opinion, October 6, 2003) (Dkt. #12, Ex. 2).

13 Petitioner appealed to the Washington Court of Appeals and that court affirmed his
14 conviction. (*Id.*) Petitioner sought review by the Washington Supreme Court; that court denied
15 review. (Dkt. #12, Ex. 7). Petitioner filed the instant habeas petition in federal court on June 1,
16 2005. (Dkt. #1). Respondent filed his answer on August 17, 2005, and the matter is now ready
17 for review.

18 CLAIMS FOR RELIEF

19 Petitioner presents the following claims for relief in his habeas petition:

- 20 1. Denial of Assistance of Counsel.
- 21 2. Violation of Due Process Rights Prior to Arraignment and Trial.
- 22 3. Denial of Equal Protection.

23 (Dkt. #1 at 6-9).

24 DISCUSSION

25 Respondent argues that the petition is subject to dismissal because (1) petitioner failed to
26 name a proper respondent, and (2) petitioner failed to exhaust his claims in the state courts, and

01 those claims are now barred from review in federal court. (Dkt. #9 at 6-8). While the record
02 appears to support the latter of these two arguments, the court need only address respondent's
03 initial argument that petitioner has failed to name a proper respondent.

04 Petitioner named Rob McKenna, Washington State Attorney General, as the sole
05 respondent in his federal habeas petition. A petitioner for habeas corpus relief must name the
06 officer having immediate custody of him or her as the respondent to the petition. *See Rumsfeld*
07 *v. Padilla*, 542 U.S. 426 (2004), *citing* 28 U.S.C. § 2242; *Stanley v. California Supreme Court*,
08 21 F.3d 359, 360 (9th Cir. 1994), *citing* Rule 2(a), 28 U.S.C. foll. § 2254. Failure to name the
09 petitioner's custodian deprives federal courts of personal jurisdiction. *Stanley v. California*
10 *Supreme Court*, 21 F.3d at 360. The Washington State Attorney General is not petitioner's
11 current custodian. Rather, petitioner's current custodian is the individual responsible for
12 supervising his current term of community custody. Petitioner raises no argument to the contrary.

13 Therefore, because petitioner has not named a proper respondent in his federal habeas
14 petition, this court lacks jurisdiction over the petition. Accordingly, this court recommends that
15 petitioner's federal habeas petition be dismissed without prejudice.

16 CONCLUSION

17 For the foregoing reasons, the court recommends that petitioner's petition for a writ of
18 habeas corpus be dismissed without prejudice. A proposed order accompanies this Report and
19 Recommendation.

20 DATED this 26th day of September, 2005.

21 

22 Mary Alice Theiler
23 United States Magistrate Judge
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